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No. 95-244

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST and MISSION REINSURANCE CORPORATION TRUST,
*Petitioner*,

v.

ALLSTATE INSURANCE COMPANY,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Commissioner respectfully submits this reply to Allstate's Brief In Opposition To Petition For Writ Of Certiorari (the "Opposition").

### I. INTRODUCTION.

The questions presented in this case are important and have a universal impact. The issue of when a district court's order is immediately appealable raises substantial questions of finality and the proper use of appellate re-

sources. The abstention issues profoundly affect not only all insurance insolvency proceedings, but also the federal courts' application of the abstention doctrine in general.

Allstate cannot deny that the decision of the Ninth Circuit in this case conflicts with prior decisions of this Court, nor can it deny there is a conflict in the circuit courts on both questions presented. Allstate merely attempts to play down the conflict in the circuits and to gloss over the conflicting precedents of this Court. At best, Allstate's opposition simply underscores the confusion and uncertainty that is created by the Ninth Circuit decision and by the conflict among the circuit courts as to both of the questions presented: (i) the question of the appealability of remand orders under the collateral order doctrine and (ii) the question of whether the abstention powers of federal courts are limited to actions in equity, or alternatively, whether *Burford* abstention is limited solely to actions in equity.

Regrettably, Allstate takes a rather cavalier attitude towards the confusion in the law by recommending to this Court that the issue of the fundamental nature of abstention doctrine should be "allowed to percolate at the lower court level for the present time." [1] Unlike coffee, the administration of justice, judicial federalism and comity do not necessarily benefit from continued percolation. Permitting the substantial rights of the insurance-buying public and the hundreds of thousands of insureds who are claimants in this and the many other insurance insolvencies now pending to percolate like so many coffee grounds for some indeterminate time, while millions of dollars are spent debating in multiple courts the very issues now presented to this Court hardly seems appropriate when this Court could grant the Commissioner's Petition and clear away the confusion now.

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[1] Opposition, at 10.



## II. AS TO THE APPELLATE REVIEW OF REMAND ORDERS.

Allstate concedes that, "On its face, 28 U.S.C. § 1447(d) seems to preclude appellate review of remand orders." [2] Allstate also effectively admits that *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988), which is also an insurance insolvency case, is in conflict with the decision of the Ninth Circuit in this case.[3] Although Allstate attempts to distinguish *Corcoran* from the more recent Second Circuit decision in *Minot v. Eckardt-Minot*, 13 F.3d 590 (2d Cir. 1994), this attempt is not persuasive, particularly in view of Allstate's concession, buried in its footnote 12,[4] that there is an open issue as to arbitration in this case. This open issue, if nothing else, prevents the remand order from being final and appealable under either *Corcoran* or *Minot*.

In *Corcoran*, the threshold issue of where the case would be tried was undecided and returned to the state court. On that basis the court held the remand order was not final and not appealable.[5] The instant case involves exactly the same issue; Allstate's assertion of the right to arbitration,[6] a threshold issue that was not determined by the remand order of the district court and that is yet to be decided by any court. Accordingly, this remand order would not be appealable in the Second Circuit. This conclusion is also dictated by the decision in

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[2] Opposition, at 11.

[3] Opposition, at 14-15.

[4] Opposition, at 16, fn. 12.

[5] The *Minot* court specifically stated "Conversely, when a district court's remand order does not determine the forum in which the dispute will ultimately be decided . . . a petition for mandamus is the only way to obtain appellate review." *Minot*, 13 F.3d at 593, n.1. This is completely consistent with the Commissioner's position and is in direct conflict with the Ninth Circuit.

[6] Opposition, at 16, fn. 12.

*Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-353 (1976), where this Court stated "because an order remanding a removed action does not represent a final judgment reviewable by appeal, the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

Allstate attempts to evade this conclusion by pointing out that it removed on diversity grounds as opposed to the grounds of arbitration.[7] The distinction makes no difference. To hold that a remand order is or is not final based on the theory of removal, as opposed to the controlling question of whether there has been a conclusive determination, is merely another attempt to elevate form over substance. Regardless of the *grounds* for removal, the remand order in this case did not conclusively determine any issue, not even the basic issue of what forum would ultimately hear the underlying dispute. Accordingly, the remand order in this case was not a final order and could not be subject to appeal.

Allstate also admits that *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993) held that a remand order is not a final order under 28 U.S.C. § 1291.[8] Allstate suggests that *Doughty* does not conflict with the Ninth Circuit decision in the instant case because the Ninth Circuit did not hold that a remand order is a "final order," but merely held that "an abstention-based remand order is appealable as a collaterally final order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[9] This weak attempt to draw a distinction slices the argument far too thin. Allstate apparently realizes this when it finally rests on the assertion that the holding in *Doughty* "leaves open the substantial possibility that, in practice, the First Circuit may permit sub-

[7] *Id.*

[8] Opposition, at 16.

[9] *Id.*



sequent appeals in remand orders based on abstention . . . ."[10] Despite the fact that *Doughty did* hold that a remand order *is not* a final order under 28 U.S.C. § 1291, Allstate engages in the dubious speculation that in some future and hypothetical case the First Circuit *might* hold that an "abstention-based remand order" *is* a final order under 28 U.S.C. § 1291.[11] The remote possibilities of the future, however, do not erase the facts of the present.

## III. AS TO THE PROPRIETY OF ABSTENTION.

Allstate presents no cogent argument to rebut the Commissioner's assertion that this case involves unique and important issues of judicial federalism. Allstate never asserts that the Ninth Circuit is correct in squarely holding that the very power to abstain is limited solely to cases of equity. Indeed, Allstate does not deny the Commissioner's point that Allstate never asserted this position, but only argued that the nature of the underlying action was *one* factor to be considered.[12]

Similarly, Allstate never responds to the Commissioner's argument or authority that it is inappropriate to base abstention doctrine on the ancient dichotomy between actions at law and equity,[13] nor does Allstate even attempt to deal with the Commissioner's point that since the underlying controversy does involve actions in equity, this case is an ideal vehicle for testing the validity of the Ninth Circuit's holding.[14]

Along the same lines, other than *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995), Allstate makes no effort to discuss the conflict in the

[10] Opposition, at 17.

[11] *Id.*

[12] See discussion in the Commissioner's Petition, at 22-23, that the Ninth Circuit granted a position not urged by Allstate.

[13] See discussion in the Commissioner's Petition, at 23-26.

[14] Petition, at 23-26.

Circuits on the nature of *Burford* abstention.[15] Allstate does not even try to explain away the conflict presented by *General Glass Industries Corp. v. Monsour Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992); *Riley v. Simmons*, 45 F.3d 764 (3rd Cir. 1995); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); or *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990).[16]

*Minot*, 13 F.3d 590, relied upon by Allstate in its fruitless effort to distinguish *Corcoran* on the reviewability issue, is not only supportive of the Commissioner on that issue, but also strongly supports the Commissioner on the abstention issue.[17] The *Minot* decision represents an excellent example of why the equity-law distinction is of little use in making abstention decisions. The crucial point in *Minot* was that "[t]he underlying action is perhaps a paradigmatic example of a case presenting 'difficult questions of state law bearing on policy problems of substantial public import. . . .'" *Minot*, 13 F.3d at 593. That Court relied on *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) to abstain

[15] Allstate seeks to distinguish *Wolfson* and even assert that it "unambiguously supports the result reached by the Ninth Circuit below," (Opposition, at 21) but makes no effort to explain away the fact that the *Wolfson* opinion expressly rejects the law-equity distinction made by the Ninth Circuit in the instant case. Moreover, Allstate makes no response to the argument in David L. Shapiro, *Jurisdiction And Discretion*, 60 N.Y.U.L. Rev. 543, 551-52 (1985), cited with approval by the Eighth Circuit in *Wolfson*, that the law-equity distinction is not a sound basis upon which to base abstention doctrine. Further, since *Wolfson* specifically mentions and rejects the Ninth Circuit's opinion in the instant case, it is impossible to accept the notion that the two do not conflict.

[16] See discussion in the Petition, at 18.

[17] *Minot* cites *Corcoran*, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), among others, with approval on the abstention question. All of these cases support the Commissioner's position.



even though it characterized the underlying action as one where "Minot seeks recovery on theories akin to what has been called a 'tort of custodial interference.'" *Id.* at 594. The court in *Minot* then drew a parallel to *Ankenbrandt* which suggested that, in certain circumstances, abstention on *Burford* grounds in a family law dispute is appropriate. *Id.* at 594-95.

Allstate has simply provided one more example of a case in which the law-equity dichotomy was disregarded in making an abstention determination, thereby emphasizing the conflict between the Ninth Circuit on the one hand and this Court and certain circuit courts on the other.[18]

Further, Allstate studiously ignores the decisions in which this Court applied the abstention doctrine to cases in which the underlying matter was not solely an action in equity. These decisions conflict with the Ninth Circuit's fundamental rationale, yet Allstate cannot explain these away,[19] or provide a reason for this Court to retract its statement in *Thibodaux*, 360 U.S. at 28, that, "These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism."

Rather than meeting the conflicting decisions and the underlying rationale head-on, Allstate attempts to sidestep and characterize this case as a mere collection action, which it is not. Indeed, Allstate never actually denies nor responds to the Commissioner's discussion as to why this is not a mere collection case.[20] For example, Allstate has nothing to say about the fact that it filed claims

[18] See the discussion in Section B of the Petition, at 19-22, where this Court's own refusal to be backed into an illogical corner based upon the out-dated law-equity distinction is discussed. See also the very recent case of *Warmus v. Melahn*, 62 F.3d 252, 255 (8th Cir. 1995) in which the Eighth Circuit rejected the argument that *Younger* abstention could not be applied in a case involving only monetary relief.

[19] See discussion in the Petition, at 19-22.

[20] See, e.g., Petition, at 3-11, 22-23.

in the receivership proceeding, pursuant to state statutes and orders of the Receivership Court, by which claims it asserts the exact offset claims asserted as affirmative defenses in the instant suit. Allstate does not address the point that failure to remand to the Receivership Court will permit Allstate voluntarily to file claims in the state receivership proceedings and then remove the adjudication of those claims to federal court, thereby evading the governing state statutes and the exclusive jurisdiction of the state Receivership Court. Allstate has no argument against the Commissioner's position that to permit claimants to remove receivership claims to various federal courts would be contrary to and disruptive of the state statutory scheme and would effectively plunge the state court proceedings into chaos. This would violate important principles of federalism and comity.

Allstate argues that the fact that this action was removed on diversity grounds should be the controlling factor in the abstention analysis.[21] This argument is not only without legitimate foundation, it actually demonstrates the fundamental evil to be avoided. In the instant case and all other complex insurance insolvency cases, the claimants reside in many states and foreign countries. If diversity jurisdiction is to be made the springboard to permit these claimants to first file claims in the state court under the statutory scheme and then remove them to multiple federal courts, either directly or under motions to change forum, the state statutory scheme will be crippled.

Allstate concedes that the district court in this case "emphasized that a central issue in this case is Allstate's defense of set-off . . . [n]oting that this issue was controlled by state law."[22] Allstate also admits that the underlying action involves a declaratory relief action by the Commissioner,[23] and does not dispute the Commissioner's description of how this case is intricately inter-

[21] Opposition, at 19-20.

[22] Opposition, at 6.

[23] Opposition, at 4, fn.3.



woven with the California statutory scheme.[24] Moreover, Allstate does not dispute the Commissioner's argument that the instant controversy involves the correct application and interpretation of California case and statutory law including unsettled issues of state law.[25]

It is also significant that Allstate does not dispute the Commissioner's point that the underlying suit involves special proceedings and an action for declaratory relief both of which are equitable proceedings. Further, Allstate makes no effort to describe how the equity-law distinction could be utilized in complex cases, such as the instant case, which involve multiple causes of action; some of which sound in equity and some of which are actions at law.

Having failed to contest these and related points, Allstate cannot and does not even attempt to deal with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15[26] and this Court's rationale in cases such as *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *California State Auto. Ass'n Inter-Insurance Bureau v Maloney*, 341 U.S. 105 (1951), and *United States Department of The Treasury v. Fabe*, 508 U.S. ——, 113 S. Ct. 2202 (1993), all of which recognize and protect the strong public policy issues involved with the insurance business and insurance insolvency proceedings. These precedents would be seriously undercut unless the Commissioner is able to administer insurance insolvency proceedings in a comprehensive state court action.

[24] Petition, at 3-9.

[25] For example, Allstate does not take issue with the Commissioner where, at page 8 of the Petition, he states "Part of the instant litigation involves the correct application and interpretation of the *Prudential* decision. There are unsettled difficult issues of state law. . . ."

[26] Allstate simply states that it disagrees with the Commissioner's assertion that McCarran-Ferguson and the cited provisions of the California Insurance Code apply to this case. Opposition, at 2. Allstate never tells this Court why they do not apply.

## CONCLUSION

Allstate fails to respond directly to the substantial authority offered by the Commissioner and presents only weak efforts to paint over the Ninth Circuit's conflicts with other circuit courts and with decisions of this Court. In the final analysis Allstate urges this Court to leave the substantial questions presented in their current state of uncertainty in the hope that, after some period of years, all will become clear without the guidance of this Court.

To deny the Commissioner's Petition would effectively fan the fires of uncertainty and create further confusion with respect to basic principles that this Court's recent opinions have done so much to protect. The opinion of the Ninth Circuit in this case should not be permitted to stand shoulder to shoulder with this Court's important recent decisions which promote fundamental principles of federalism, defend the prerogatives of state government and promote the wise allocation of judicial and appellate resources. The Commissioner's Petition should be granted.

Respectfully submitted,

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